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ALEXANDER
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No. 80-1470

In the Supreme Court of the United States

OCTOBER TERM, 1980

LUTHER T. PENNINGTON AND SENATOR HARDING COLBERT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that evidence seized from their quonset hut pursuant to a valid warrant should have been suppressed because the search was conducted by state officers, rather than federal officers, as required by Fed. R. Crim. P. 41(c)(1).

Following a ~~jury~~ bench trial in the United States District Court for the Eastern District of Oklahoma, petitioners were convicted of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Pennington was sentenced to four years' imprisonment and petitioner Colbert was sentenced to two years' imprisonment. Both prison sentences were suspended in

favor of a three-year term of probation.[1] The court of appeals affirmed (Pet. App. A-1 to A-7), one judge dissenting (Pet. App. B-1 to B-5).

Prior to trial, petitioners moved to suppress evidence seized from a quonset hut owned by them. After an evidentiary hearing, the motion was denied. The evidence at the hearing showed that Freddie Keith Means, an agent for the Oklahoma Bureau of Narcotics and Dangerous Drugs Control, received information from a confidential informant that petitioners were growing marijuana in their quonset hut in Ada, Oklahoma. Agent Means subsequently conferred with an Assistant United States Attorney, who thereafter supervised the investigation in this case and arranged for Means to meet with a United States Magistrate for procurement of a search warrant (Pet. App. A-2). On May 7, 1979, the magistrate issued a warrant to search the quonset hut based entirely on the affidavit of Agent Means (Pet. App. E-1 to E-5). The warrant was directed to the "U.S. Marshal or any other authorized law enforcement officer" (*id.* at E-4). It was executed by Agent Means, a fellow state agent, two deputy sheriffs, and a member of the state highway patrol, all of whom were fully authorized under Oklahoma law to conduct searches. The search of the quonset hut revealed a great number of marijuana plants (Pet. App. A-2).

2. Petitioners contend that the evidence seized from the quonset hut should have been suppressed because Agent Means and the other state law enforcement personnel involved in the search were not "civil officer[s] of the United States" nor "person[s] * * * authorized by the President" to

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[1] Each petitioner additionally received a two-year special parole term. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), this Court recently held that a special parole term may not be imposed as a part of a sentence for a narcotics conspiracy. Petitioners may move for correction of their sentences in the district court under Rule 35 of the Federal Rules of Criminal Procedure.

enforce federal law, within the meaning of Fed. R. Crim. P. 41(c)(1). Because the warrant was issued by a federal magistrate in connection with a violation of federal law, we agree that the search was federal in character and thus subject to the requirements of Rule 41. See *United States* v. *Millar*, 543 F. 2d 1280, 1284 (10th Cir. 1976); *United States* v. *Sellers*, 483 F. 2d 37, 43 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974). We also agree that Agent Means and the other state officers assisting him were not qualified to conduct the search under Rule 41(c)(1) without the presence of federal officers. See also 18 U.S.C. 3105. Nevertheless, the court of appeals correctly concluded that the technical violation of Rule 41 that occurred here did not warrant suppression of the seized evidence.

As this Court noted in *United States* v. *Calandra*, 414 U.S 338, 348 (1974), "the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Because the primary, if not exclusive, purpose of the exclusionary rule is to deter police conduct that violates the Fourth Amendment (see, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976)), the federal courts have declined to extend this drastic, truth impairing remedy to nonconstitutional and nonprejudicial violations of the technical requirements of Rule 41. See, *e.g.*, *United States* v. *Garrett*, 565 F. 2d 1065, 1071 (9th Cir. 1977), cert. denied, 435 U.S. 974 (1978); *United States* v. *Turner*, 558 F. 2d 46, 52 (2d Cir. 1977); *United States* v. *Burgard*, 551 F. 2d 190, 193 (8th Cir. 1977); *United States* v. *Dauphinee*, 538 F. 2d 1, 3 (1st Cir. 1976); *United States* v. *Dudek*, 530 F. 2d 684, 688 (6th Cir. 1976); *United States* v. *Hall*, 505 F. 2d 961, 964 (3d Cir. 1974). See also *United States* v. *Caceres*, 440 U.S. 741 (1979).[2] Rather, it is well

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[2] *Miller* v. *United States*, 357 U.S. 301 (1958), is not to the contrary. In *Miller*, the Court concluded that a violation of the knock-and-announce provision set forth in 18 U.S.C. 3109 warranted suppression

settled that suppression of evidence is an appropriate remedy for the breach of Rule 41 only where the search substantially prejudiced the defendant's rights or where the violation was intentional and deliberate. See, *e.g.*, *United States* v. *Radlick*, 581 F. 2d 225, 228 (9th Cir. 1978); *United States* v. *Dauphinee, supra*, 538 F. 2d at 3; *United States* v. *Burke*, 517 F. 2d 377, 386-387 (2d Cir. 1975).[3]

Here, the violation of Rule 41 was neither deliberate nor prejudicial to petitioners. The court of appeals correctly concluded that "[t]here is nothing to indicate that the search would not have occurred but for the violation of the rule, or would not have been 'so abrasive' if the rule had been followed" (Pet. App. A-4 to A-5, quoting *United States* v. *Burke*, *supra*, 517 F. 2d at 386-387). In light of the AUSA's involvement in this investigation, it is inevitable that federal officers would have conducted the same search that was in fact conducted by state officers. Cf. *United States* v. *Caceres, supra*, 440 U.S. at 752. Moreover, contrary to petitioners' claim (Pet. 5, 19), the court of appeals found that the state officers had not inflicted unnecessary or unreasonable damage on the quonset hut, but that "[a]ny damage was incidental to the gathering of evidence" (Pet.

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of the seized evidence. But Section 3109 has constitutional underpinnings and is designed to protect an individual's reasonable expectation of privacy in his home. In contrast, a search by state agents is no more intrusive than the same search conducted by federal agents. See *United States* v. *Caceres*, *supra*, 440 U.S. at 752.

[3]In light of the First Circuit's decision in *Dauphinee* and the Ninth Circuit's decisions in *Radlick* and *Garrett*, petitioner's reliance (Pet. 12) on *Perry* v. *United States*, 14 F. 2d 88 (9th Cir. 1926), and *Leonard* v. *United States*, 6 F. 2d 353 (1st Cir. 1925), is misplaced. Whatever vitality those decisions retain, both cases were decided before the adoption of Rule 41 and thus do not purport to address the issue in this case.

App. A-5).[4] Likewise, the record fully supports the court of appeals' finding that "the deviation from the literal requirements of Rule 41(c) was [n]either intentional [n]or deliberate, [and did not] in anywise undermine[ ] the integrity of the whole process" (Pet. App. A-5).[5] Further review of these essentially factual questions is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]Furthermore, petitioners do not suggest that any evidence was discovered as the result of the state officers' allegedly unreasonable conduct. Rather, petitioners' claim focuses on the manner in which the officers removed the marijuana plants from petitioners' quonset hut. Insofar as the state officers' allegedly unreasonable search thus did not prejudice petitioners' defense at trial, the appropriate remedy is a damages action rather than the suppression of evidence in this criminal case.

[5]The Fifth Circuit's decision in *Navarro* v. *United States*, 400 F. 2d 315 (1968), is thus readily distinguished. In that case, a local judge, who was not an authorized judge of a "court of record" within the meaning of Rule 41(a), purported to issue a warrant. Because no appropriate judicial officer had passed upon the sufficiency of the affidavit, the search in question was void *ab initio* and the "integrity of the whole process" was called into question. Here, however, a federal magistrate considered and issued an unquestionably valid warrant. Petitioners' sole contention is that the AUSA conducting this investigation should have ordered a federal officer to accompany the state officers who conducted the search.

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